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NO. A-313

IN THE

Supreme Court of the United States

October Term, 1983

FRANK M. PIANKO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
OF PETITIONER FRANK M. PIANKO

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QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR BY FAILING TO SET ASIDE AS AN ABUSE OF DISCRETION THE DISTRICT COURT'S FAILURE TO ADMIT INTO EVIDENCE AS BUSINESS RECORDS OF CAMDEN THOROUGHBRED FARMS CERTAIN DOCUMENTS WITHIN THE MEANING OF RULES 401 AND 803(6) OF THE FEDERAL RULES OF EVIDENCE?

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REFERENCE TO THE OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

1. References to the rulings of the United States District Court for the Eastern District of Michigan and the testimony at trial are set forth at: 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

No opinion or order was issued by the United States District Court for the Eastern District of Michigan as a jury verdict was rendered at the conclusion of trial.

2. References to the opinion and order of the United States Court of Appeals for the Sixth Circuit are set forth at: 10, 11 and 12.

The opinion and order of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix attached hereto.

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STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

This Court's jurisdiction under 28 USC § 1254(1) is invoked with the pertinent dates of this Petition for Certiorari set forth below:

April 21, 1982: Petitioner was indicted by a Federal Grand Jury on five counts of violating 26 USC § 7201.

August 20, 1982: An Eastern District of Michigan jury found Petitioner guilty on all five counts charged in the Indictment.

October 1, 1982: Petitioner filed a Notice of Appeal appealing the Judgment rendered in this action to the United States Court of Appeals for the Sixth Circuit.

September 9, 1983: Petitioner's conviction was affirmed on appeal to the United States Court of Appeals for the Sixth Circuit.

October 3, 1983: The United States Court of Appeals for the Sixth Circuit issued a mandate for enforcement of the Order entered September 9, 1983, which mandate was recalled by order of the Court, dated November 29, 1983.

October 25, 1983: Petitioner filed an Application for Extension of Time in which to File the Instant Petition for Writ of Certorari.

October 28, 1983: The United States Supreme Court granted Petitioner's Application for an Extension of Time to File a Petition for Writ of Certiorari until and including December 8, 1983.

STATUTE INVOLVED

Section 7201 of Title 26 is the pertinent statute under which Petitioner was convicted:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

On April 21, 1982, Petitioner was indicted by a Federal Grand Jury on five counts of violating 26 U.S.C. § 7201, for willfully attempting to evade or defeat a *substantial* amount of federal income taxes. Count I of the Indictment pertained to Petitioner's individual federal income tax return for the calendar year 1976, and Counts II and III related to the calendar years 1977 and 1978, respectively. Counts IV and V charged Petitioner with willfully attempting to evade or default a substantial amount of federal income taxes due and owing by Warrendale Manufacturing Co., a Michigan Corporation, of which the Petitioner was the President and sole shareholder, for its fiscal years ending August 31, 1977 and August 31, 1978.

Thereafter, on August 12, 1982, the case proceeded to trial before a jury presided over by the Honorable Anna Diggs Taylor, United States District Court Judge for the Eastern District of Michigan. The jury found the

Petitioner guilty on all five counts charged in the Indictment on August 20, 1982. The method of proof utilized by the Government in this prosecution to show substantial understatements of taxable income was the specific item method.

The defense did not dispute the fact that the various amounts claimed by the Government to represent unreported gross income were not reported on either Petitioner's individual tax returns, reflected on Schedule C as gross income from the conduct of a trade or business as a sole proprietorship, or on the income tax returns of Warrendale Manufacturing Co., a Michigan Corporation. In fact, the defense not only stipulated to the unreported amounts of gross income, but likewise acknowledged the same to the jury in its opening statement (TR. 8/12/82, pp. 16-17). In addition, Petitioner readily admitted during direct examination that the stipulated amounts of gross income were not reported by him individually on Schedule C or by Warrendale Manufacturing Co., a Michigan Corporation, for tax purposes (TR. 8/13/83, pp. 117-118).

The defense to this prosecution was that these unreported amounts of gross income were spent by Petitioner to offset deductible expenses which were not previously taken. If these expenses were considered, the defense contended there was no tax due and owing, negating one of the requisite elements to be proved by the Government (TR. 8/12/82, p. 18). These expenses pertained to the operation of Camden Thoroughbred Farms. In this connection, the defense set forth very detailed documentation attempting to indicate that, in fact, there was not a substantial tax due and owing. Petitioner's Exhibit 8 revealed that various amounts deposited into a Michigan National Bank account were

disbursed from such account on behalf of Warrendale Manufacturing Co. and Camden Thoroughbred Farms; the Camden Thoroughbred Farms disbursements being unreported business expenses and, hence, deductions which would be allowable to offset unreported income. Less than $10,000 of these expenditures were not properly allocated as deductible type items (TR. 8/17/82, pp. 76-83).

In support of this defense, Petitioner introduced into evidence the canceled checks, check stubs and monthly check statements relating to the aforestated Michigan National Bank account for each of the years at issue (Petitioner's Exhibits 1, 2 and 3). In order to substantiate these expenditures by the Petitioner and explain certain of the cash payments from the Michigan National Bank account, the defense attempted to have admitted into evidence as business records of Camden Thoroughbred Farms, pursuant to Rule 803(6) of the Federal Rules of Evidence, proposed defense Exhibits 4, 5 and 6, which represented certain bills, invoices and other statements for services and goods rendered relating to the years, respectively, 1976, 1977 and 1978 (TR. 8/13/82, pp. 93-117). These bills, invoices and other statements for services and goods rendered represented vendor statements received by Petitioner in his capacity as the sole proprietor of Camden Thoroughbred Farms and were kept and maintained by him as part of his ordinary and regular business practice in the regular and usual course of business of Camden Thoroughbred Farms. However, the trial court refused to admit Petitioner's proposed Exhibits 4, 5 and 6 into evidence, indicating that Camden Thoroughbred Farms was not a "business" (TR. 8/13/82, pp. 101, 103, 109 and 110). Because one of the elements necessary to be proved by the Government

in order to obtain a conviction under 26 U.S.C. § 7201 is that there is a substantial tax due and owing, the question of whether Camden Thoroughbred Farms is a "business" was of primary importance. That determination and the subsequent question whether a substantial tax was due and owing was clearly a factual determination to be made by the jury. However, the trial court's statements that Camden Thoroughbred Farms was not a "business," in effect, took this important factual issue from the province of the jury and resulted in a directed verdict for the Government as to the element of a substantial tax due and owing. The trial court's failure to recognize Camden Thoroughbred Farms as a business was particularly egregious in view of the abundant evidence to the contrary in the record.

The Petitioner testified that he acquired Camden Thoroughbred Farms to establish a horsebreeding and farming business (TR. 8/13/82, pp. 91-97). The farming aspect of the business consisted of an agreement between Petitioner and certain sharecroppers who would split the costs and the crop with Petitioner on an equal basis (TR. 8/13/82, p. 91). Because Petitioner was based in Dearborn, Michigan, he hired a business manager to run the breeding and farming operations (TR. 8/13/82, pp. 92-93). Moreover, certain income and expenses of the business entity of Camden Thoroughbred Farms was reported on Petitioner's federal income tax returns and appeared on Schedule C thereon for each year at issue (TR. 8/13/82, pp. 97-98, Exhibit 22).

The bills, invoices and other statements for services and goods rendered in the course of doing business as Camden Thoroughbred Farms were the exclusive responsibility of and received by Petitioner at his offices at Warrendale Manufacturing where he made certain that

the sundry vendors were paid for services rendered (TR. 8/13/82, pp. 99-107). One bank account for Camden Thoroughbred Farms was maintained at the Litchfield branch of the Michigan National Bank, upon which the payroll for the Farm employees was satisfied. The additional expenses of Camden Thoroughbred Farms were routinely and regularly paid from the Warrendale Manufacturing Michigan National Bank account (TR. 8/13/82, pp. 103-104).

Most importantly, Petitioner was very succinct in indicating that he marked the check number on each of the particular bills, invoices and other statements for services and goods rendered on the day that he wrote the particular check on behalf of the farm in payment thereof from the Warrendale Manufacturing account (TR. 8/13/82, pp. 105-106). The Petitioner further testified that a check register and a sales receipt journal for Camden Thoroughbred Farms were additional records maintained by him at his Warrendale Manufacturing office address. These records were subsequently turned over to his accountant, Arnold Zalenko, for use in preparing the before-noted Schedule C's (TR. 8/13/82, pp. 110-112), although the invoices and other statements for goods and services rendered, along with the canceled checks from the Michigan National Bank account which were utilized to pay the farm's expenses were not turned over to the accountant, but were maintained by Petitioner (TR. 8/13/82, p. 114).

Upon this record, the trial court concluded that Petitioner failed to qualify Camden Thoroughbred Farms as a "business" and, therefore, refused to enter Exhibits 4, 5 and 6 as business records. Thereafter, on October 1, 1982, Petitioner was sentenced to the custody of the Attorney General for a period of 18 months as to each of

the five counts, with the sentences to run concurrently, and fined in the amount of $5,000.

Additional facts, as required to present the Argument herein, will be set forth in the body of this Brief.

ARGUMENT

Rule 401 of the Federal Rules of Evidence establishes that evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. When evidence is found to be relevant, it is admissible, with few exceptions, pursuant to Rule 402 of the Federal Rules of Evidence.

According to Rule 401, relevancy is a relationship between a proferred item of evidence and a "fact that is of consequence to the determination of the action." An item of evidence is of consequence to the determination of the action when it has a direct bearing upon the guilt or innocence of an accused. *United States* v. *Mandel*, 591 F.2d 1347, 1366-67 (4th Cir. 1979), cert. denied, 445 U.S. 961, 100 S. Ct. 1647, 64 L. Ed. 2d 336 (1980).

In determining questions of relevance, a trial judge is given a wide range of discretion. *Hamling* v. *United States*, 418 U.S. 87, 124-25, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); *United States* v. *Phillips*, 575 F.2d 97, 100 (6th Cir. 1978). In a criminal case, a trial judge *must*, in the exercise of sound discretion, weigh the probative value of the proferred evidence against the possibility of undue prejudice. *United States* v. *Jenkins*, 525 F.2d 819, 824 (6th Cir. 1975). On appeal, evidentiary rulings will be disturbed only in the event of a grave abuse of discretion. *United States* v. *McFadyen-Snider*, 552 F.2d

1178, 1182 (6th Cir. 1977); *United States* v. *Worthington*, 698 F.2d 820, 827 (6th Cir. 1983); *United States* v. *Blanton*, 700 F.2d 298, 313 (6th Cir. 1983). Under the facts of this case, it is clear that the District Court abused its discretion and the Appellate Court impermissibly sanctioned that abuse.

In *F & S Offshore, Inc.* v. *K.O. Steel Castings, Inc.*, 662 F.2d 1104, 1107-08 (5th Cir. 1981), the Court set forth the standard upon which an issue under Rule 401 should be reviewed: "In reviewing the district court's decision, an appellate court should assume the maximum probative force and the minimum prejudice to be reasonably expected." Moreover, a trial judge *must* identify and articulate the circumstances and factors crucial to his or her ruling upon such an issue so that an appellate court can discern whether there has been an abuse of discretion. *United States* v. *Robinson*, 560 F.2d 507 (2nd Cir. 1977).

Indeed, the trial court's function in determining relevancy is: "only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to certain other rules, admissible. . . . Even, therefore, if a juror decides that the probability is only 40% that the document referred to above is authentic, it may help him determine whether the material proposition is more probably true than not." *United States* v. *Schipani*, 289 F. Supp. 43, 56 (E.D. N.Y. 1968). The *Schipani* Court concluded that a judge's function in determining admissibility in a case is, therefore, relatively simple; there being no need to be unduly concerned about mistakenly admitted evidence since if the document lacks probative force the jury can be counted on to ignore it.

Particularly egregious is the instance where a trial court confuses relevancy with the sufficiency of a party's proof enabling him to get to the jury on an issue. See, for example, *United States* v. *McCoy*, 517 F.2d 41, 43-44 (7th Cir. 1975), cert. denied, 423 U.S. 895, 96 S. Ct. 195, 46 L. Ed. 2d 127 (1975), and *United States* v. *Kreimer*, 609 F.2d 126 (5th Cir. 1980), where evidence concerning the amount realized on certain collateral was introduced into evidence in a prosecution for mail fraud. The Court found that the evidence "had some logical tendency to support the argument that the collateral was over-valued, and it was, therefore, relevant and admissible," Id at 131, but too weak in and of itself to establish the Government's thesis that there was a deficiency in the collateral. See also, *United States* v. *Woods*, 44 F.2d 127, 130 (4th Cir. 1973), cert. denied, 415 U.S. 979, 94 S. Ct. 1566, 39 L. Ed. 2d 875 (1974).

Here, the District Court refused to introduce into evidence certain invoices which were identified by Petitioner as business records kept in the ordinary course of Petitioner's business. Those records established, as the testimony of defense expert Burton W. Carlson, Jr. revealed, that Petitioner had an excess of unreported deductible business disbursements for the years 1976, 1977 and 1978 over admitted unreported income. (TR. 8/17/82, pp. 82-83). Obviously, the records were material to the outcome of the trial and tended to establish a "fact that is of consequence to the determination of the action"; i.e., the existence of a complete defense to the Government's prosecution. Further, the maximum probative force of the records would have led to a verdict of not guilty as compared to the minimum prejudice which is reasonably ascertainable for the failure to admit these records, the same being the very result rendered after three days of

deliberation; a guilty verdict. In fact, an examination of the instruction to the jury with respect to this defense reveals:

> The Court instructs the jury that if it finds there are offsetting deductible business expenses which were not taken by the defendant in his tax returns for the calendar years set forth in the indictment, and such offsetting deductions are in dollar amounts such that when deducted from the omitted sales, there is not a substantial additional amount of federal income tax due and owing from the defendant for any of the calendar years charged in the indictment, then the government has failed to prove an essential element of the offense charged, and you must then find the defendant not guilty for any such calendar year. (TR. 8/18/82, pp. 24-25).

It is reasonable to infer that if these records had been admitted into evidence that the jury would have in all probability returned a different verdict. Instead, the trial court declined to allow the records to be introduced, ruling that Petitioner had failed to lay a proper foundation for their introduction, thereby making the above instruction a superfluous gesture.

The Court opined that because the invoices were generated by another company besides Camden Thoroughbred Farms, they did not constitute the business records of Camden Thoroughbred Farms, even though Petitioner testified that these invoices were routinely kept by Camdem Thoroughbred Farms and specifically marked for retention and record purposes by that business. The trial court also believed that no evidence had been admitted which tended to

demonstrate that Camden Thoroughbred Farms was a business (TR. 8/13/82, pp. 116-117). Accordingly, the trial court inferentially declined to admit these records on relevancy grounds, the denial being based, however, primarily upon the trial court's misapplication of Rule 803(6) of the Federal Rules of Evidence.

The United States Court of Appeals for the Sixth Circuit did not reach the question of the admissibility of these Exhibits under Rule 803(6), instead finding that a proper foundation for the documents was never laid, therefore, ruling that the records were irrelevant and hence inadmissible. Notably, neither court engaged in the requisite weighing of the probative value of this evidence versus the likely prejudicial effect of its introduction, a factor in and of itself which should compel this Honorable Court to remand this action to the trial court. The District Court, although, did recognize in a comment that: "(t)he dollar amounts have particular significance in this case which means to be valid, to be accepted into evidence as the attorney said, he'll have to meet the business records rule." (TR. 8/13/82, p. 116)

The District Court, therefore, premised its ruling upon a hybrid interpretation of Rules 401 and 803(6) of the Federal Rules of Evidence. The Court of Appeals further mystified the evidentiary ruling upon the subject by disclaiming that it had addressed Rule 803(6), while at the same time concluding that: (1) it is undisputed that the content of the documents, without more, does not demonstrate that the expenses were business-related, and (2) Petitioner was given an ample opportunity to establish through testimony that each invoice represented a business expense of Camden Thoroughbred Farms, but failed to do so (Appendix p. A-2).

These findings led to the aforestated conclusion that a proper foundation had not been laid. Yet, a review of the record discloses that the invoices were never introduced into evidence. How then could the Court of Appeals opine upon the contents of the documents when they were not disclosed? It appears that the Court of Appeals has inexplicably and illogically used the absence of the documents to justify their preclusion from the record. Further, the Court of Appeals represents that Petitioner was given an ample opportunity to establish through testimony that each invoice represented a business expense of Camden Thoroughbred Farms. In fact, the record discloses that defense counsel did attempt to examine Petitioner with regard to each and every invoice. The trial court, however, would not permit defense counsel to proceed (TR. 8/13/82, p. 102). Where then was the "ample opportunity" referred to by the Court of Appeals? As the record clearly reveals, there was no opportunity whatsoever.

A careful review of that record demonstrates the relevancy of the Exhibits in question and their compliance with Rule 803(6) of the Federal Rules of Evidence. At the very beginning of the trial, defense counsel informed the jury and the Court in his opening statement that Petitioner's defense would be that the unreported income at issue was offset by unreported expenses of Camden Thoroughbred Farms. To that end, the defense established that Petitioner operated a farm in Camden, Michigan, where he raised horses, including race horses, and crops through sharecropping agreements. If there was any doubt that Petitioner's farm was a business, that doubt was resolved by the testimony of the Government's expert witness, Robert Campbell, who on direct examination by the Assistant United States Attorney testified that in computing the

alleged taxable income for Petitioner, certain farm expenses were substracted (TR. 8/13/82, pp. 38-53) This was done in accordance with *Stipulation 8* which states:

> The following checks drawn on Michigan National Bank Checking Account No. 0281-2118-4 were expenditures in connection with Camden Farm. *These expenses would be deductible if Camden Farm were an activity engaged in for profit.* (Emphasis Supplied)

The fact that Camden Thoroughbred Farms was an activity engaged in for profit was illustrated by the testimony of Petitioner, who stated that he had bought a run down farm to establish a horse breeding and crop raising business (TR. 8/13/82, p. 91). A manager was hired to oversee the farm and the operations of the business (TR. 8/13/82, pp. 92-93). Camden Thoroughbred Farms incurred expenses as evidenced by Petitioner's Exhibits 4, 5 and 6 which constituted statements, bills, invoices and receipts relating to the operation of that business in 1976 through and including 1978, respectively (TR. 8/13/82, pp. 93-94). Defense counsel, thereupon, moved to admit Exhibits 4, 5 and 6 into evidence. Government counsel, however, objected to their admission arguing that whether they establish a deduction is irrelevant (TR. 8/13/82, p. 95). The record thereafter reveals the inability of the trial court to comprehend the nature of the defense being presented:

> The Court: *What does it have to do with this?*
>
> Mr. Rubenstein: Your Honor, it has to do with the fact that these represent invoices for expenses which were paid out of the Michigan National Bank account for and on behalf of the farm and/or the business deductible expenses.

The Court: He said they were various payments. And six is a bill for something at Camden Farms. That is your testimony? Everything here is a bill?

The Witness: Yes, Your Honor.

The Court: And everything there has been paid out of the checks in Defendant's Exhibit 2. There's nothing in any of these that isn't also in two. They were all paid out of number two, as I understand it, by these checks.

Mr. Rubenstein: Yes.

The Court: *So how does that still relate to this lawsuit*? (Emphasis Supplied) (TR. 8/13/82, pp. 95-96).

Defense counsel endeavored to explain the theory of the defense. The trial court, however, still did not fathom the explanation and failed to recognize that Petitioner maintained a business at Camden Thoroughbred Farms:

The Court: (Interposing) But these are not yet relevant because we don't know why they'd be business expenses. They are bills which the witness testified he paid out of this account. So they do represent where some portion of the funds went.

You have not laid a foundation of relevance why those bills have anything to do with this case.

Mr. Rubenstein: Well, those bills represent in fact a substantiation for the business deductions.

The Court: Well, *what business*? Sustained. (Emphasis Supplied) (TR. 8/13/82, pp. 96-97).

Defense counsel, accordingly, established that Camden Thoroughbred Farms was, in fact, a business engaged in for profit and that the Exhibits represented business records for Camden Thoroughbred Farms, which the witness was uniquely qualified to testify upon:

Mr. Rubenstein: Okay. All right.

Q (By Mr. Rubenstein) Mr. Pianko, what is Camden Farms?

A Camden Farms is a thoroughbred farms.

The Court: What?

The Witness: Thoroughbred farms, Your Honor.

Q (By Mr. Rubenstein) And you are in fact *doing business* under the name Camden Thoroughbred Farms?

A *Yes.*

Q And where is Camden Thoroughbred Farms located?

A Camden, Michigan.

Q And do you report on your Federal Income Tax Return the income from Camden Thoroughbred Farms?

A Yes.

Q *Does Camden Thoroughbred Farms operate as a business entity?*

A *Yes*

Q Do you own Camden Thoroughbred Farms?

A Pardon?

Q Do you own Camden?

A Do I call it that —

Q (Interposing) I'm sorry. Own it?

A Yes I do.

Q *All right. Are the invoices which I have placed in front of you invoices in large part on behalf of Camden Thoroughbred Farms?*

A *Yes.*

Q Are there also within those invoices — I'm sorry. Are these also, within those folders, notations or statements on behalf of Warrendale Manufacturing Company?

A Is there any from Warrendale here, no, they're all from the farm.

Q The invoices that you noted there to be from the farm were they in fact paid?

A Were they what?

Q Paid?

A Yes, they were paid, yes, sir.

Q And who paid them?

A Well, I paid some with check and some with cash.

Q Are there notations on those invoices?

A Yes, sir. Yes. there's —

Q (Interposing) *The notations that you are looking at, did you in fact, in your handwriting, make the notations at the time the bills were paid?*

A *Yes.*

Q Do you see anyone else's handwriting on there?

A No.

Q Will you take a few moments and look through each envelope and see if there's notations other than your own?

A The others — my manager's here on this one here. And this was paid by me.

Q All right. *So that the statements and invoices were in fact paid by you?*

A *Yes, sir.*

Q Now, let me clear — where were these paid out — which bank account?

A Michigan Bank.

Q And these represent those invoices in support of these checks written from the Michigan National Bank?

A Yes.

Q And were in fact those invoices that you have looked at for the period, 1976, '-7, and '-8, are those the same invoices covering the years 1976, '77 and '78?

A Yes, sir, they do. '76, '77, '78.

Q All right. And do — *did you receive these statements and invoices in the course of your doing business as Camden Thoroughbred Farms?*

A *That's right, sir.*

Q *And did you pay those invoices from the Michigan Bank as you were in the process of doing business as Camden Thoroughbred Farms?*

A *Yes, sir.*

Q And that follows within the payment of the invoices, *you would make a notation that the invoice was paid?*

A *Yes.* (Emphasis Supplied) (TR. 8/13/82, pp. 97-100).

Again, defense counsel moved to admit Exhibits 4, 5 and 6 into evidence as business records of Camden Thoroughbred Farms. The trial court remained perplexed, indicating:

> The Court: The Camden Farms was in what business, and did Camden Farms have any checkbooks? Did Camden Farms have a bank account or was all Camden Farms business (sic) was done under a bank account of Warrendale Manufacturing?
>
> The Witness: I beg your pardon?
>
> The Court: This business, Camden Farms, did you have a bank account?
>
> The Witness: Yes. It had a bank account for just payroll.
>
> The Court: *But it was the business practice of Camden Farms to write checks in the name of Warrendale Manufacturing?*
>
> The Witness: *Yes, Your Honor.*
>
> * * *
>
> The Court: Well, we don't know that we have a business yet from which business records would be accepted as having been produced in the due course of business. If we had a business I don't know that this would be a showing that

> they were done in the due course of business because they don't appear to be done as usual business records. Sustained. (Emphasis Supplied) (TR. 8/13/82, pp. 100-101).

An offer was, therefore, made to document *each* and *every* invoice and/or statement as a business record of Camden Thoroughbred Farms. The trial court was adamant and stated:

> The Court: (Interposing) Well, Counsel, to adjudicate that they can be received for that reason. The Court has to find preliminary that there was a business, what the due course of that business was, to keep records under this person's supervision and then that the records you are offering were kept as the usual records in the due course of that business in the usual business procedures. None of that has been established. (TR. 8/13/82, p. 103).

To the contrary, as set forth at length above, unrefuted testimony was already in the record which unequivocably established that Camden Thoroughbred Farms was a business engaged in breeding horses and raising crops, which business Petitioner owned and supervised and which generated expenses that were paid in the normal course of business. The payment of those expenses resulted in the retention and generation of records kept in the usual course of the business, Petitioner informing the Court and jury that the statements and invoices were received in the course of his doing business as Camden Thoroughbred Farms (TR. 8/13/82, pp. 99-100).

Nonetheless, defense counsel further attempted to elicit testimony upon this point. Petitioner related that Camden Thoroughbred Farms maintained a bank

account at the Litchfield Branch of Michigan National Bank, upon which most of the payroll for Camden Thoroughbred Farms was paid. However, there was never enough funds in the Litchfield account to pay all of the business expenses and so when this account was low, the remaining invoices and/or expenses were paid from an account kept at the Detroit Branch of Michigan National Bank by Warrendale Manufacturing (TR. 8/13/82, p. 104). Importantly, Petitioner was the only individual responsible to see that these invoices were paid and since the statements arrived at Petitioner's office at Warrendale Manufacturing he paid them from the Warrendale Manufacturing account instead of simply transferring whatever necessary funds to the Litchfield Branch of Michigan National Bank. Indeed, as the Litchfield account was used to mostly meet payroll expenses, the Warrendale Manufacturing account was primarily used to pay all the other expenses of Camden Thoroughbred Farms. Petitioner marked the invoices and noted the check numbers from the Warrendale Manufacturing account on the day the invoices were paid so that they could be identified as business expenses for Camden Thoroughbred Farms and would not be confused with the business activities of Warrendale Manufacturing (TR. 8/13/82, pp. 105-106). Once again, defense counsel moved to admit Exhibits 4, 5 and 6 into evidence as the business records of Camden Thoroughbred Farms. The Government did not question that these were, in fact, business records, but argued that the Exhibits were inadmissible because some of the invoices in question may have related to Warrendale Manufacturing as opposed to Camden Thoroughbred Farms. The trial court sustained this objection, even though defense counsel was previously prevented from questioning the witness with respect to each and every document and upon the ground that:

> The Court: . . . we don't know yet the business of Camden Farms that would entitle it to the business records exception of the hearsay rule. (TR. 8/13/82, p. 106).

The prior testimony of Petitioner and numerous other witnesses was, therefore, once more brought to the attention of the trial court; Petitioner stating that Camden Thoroughbred Farms was engaged in farming and raising Michigan bred horses. Additionally, Petitioner related that only one invoice from all of the documents contained in the Exhibits pertained to Warrendale Manufacturing (TR. 8/13/82, pp. 106-107). Having demonstrated the existence of a business and resolved the objection raised by the Government, defense counsel moved to have Exhibits 4, 5 and 6 admitted into evidence. The trial court still did not accept the fact that Camden Thoroughbred Farms was a business, which "conducted business in the usual and due course of business." (TR. 8/13/82, p. 110). Therefore, the trial court declined to rule that the Exhibits were business records.

Hence, defense counsel set upon the task of further establishing that Camden Thoroughbred Farms was a business. Petitioner testified that he purchased the business approximately eight years previously and that since that time he has been solely responsible for the retention of the business records of Camden Thoroughbred Farms and had kept the same in his office at Warrendale Manufacturing. The trial court, seemingly in amazement, questioned whether there were books and records for Camden Thoroughbred Farms, to which Petitioner reiterated:

> The Witness: Yes, they're kept, regular books.
>
> The Court: Well, how were these payments

made on behalf of Warrendale Manufacturing handled in the books and records?

The Witness: Whatever record is paid out from the Warrendale firm and whatever record is paid out of either one is *marked on the bills* by Warrendale. (Emphasis Supplied) (TR. 8/13/82, p. 111).

At this point it is clear that the trial court believed that Warrendale Manufacturing was paying the expenses of Camden Thoroughbred Farms — a fact which simply did not exist and which Petitioner previously and expressly refuted.

These books and records which include, inter alia, a check register and sales receipt journal, were maintained by Petitioner's accountant, Arnold Zalenko, for and on behalf of Camden Thoroughbred Farms (TR. 8/13/82, p. 112). These records were used by Petitioner's accountant to prepare Petitioner's federal income tax returns. However, Mr. Zalenko did not have in his possession the invoices and statements contained in Exhibits 4, 5 and 6 as he was unaware of the bank account utilized to pay these particular invoices (TR. 8/13/82, p. 114). Thus, Petitioner kept a portion of the business records of Camden Thoroughbred Farms in his sole possession, separate and apart from those records which were tendered over to Mr. Zalenko. Admittedly, this was not the most prudent way of maintaining business records. However, poor bookkeeping, even novel bookkeeping, was not at issue in the criminal trial of Frank M. Pianko. It is undisputed that Petitioner kept the documents contained in Exhibits 4, 5 and 6 as a record of payment by Camden Thoroughbred Farms; the Petitioner marking those invoices with a particular letter and noting the check number that the invoices were paid with so that

the accounts of Camden Thoroughbred Farms and Warrendale Manufacturing were not intermingled or confused. The only event which occurred was that Petitioner cheated himself by failing to deduct all his business expenses for Camden Thoroughbred Farms for 1976, 1977 and 1978. While the trial court may disapprove of the method of keeping these business records, it cannot, however, substitute its judgment for the fact that this was how the records were kept. Nonetheless, that is precisely what occurred. The trial court completely ignored Petitioner's testimony and concluded after defense counsel made a further effort to introduce the Exhibits as business records that:

> The Court: These are records produced — the other documents were *all produced by other businesses* and were received by him, apparently on behalf of one of his business entities or one of his entities. But they are being offered to show that the amounts have something to do with this case. *The dollar amounts have particular significance in this case which means to be valid, to be accepted into evidence as the attorney said, they will have to meet the business records rule.* (Emphasis Supplied) (TR. 8/13/82, p. 116).

Finally, the trial court in allowing Petitioner to reserve the right to present further evidence upon the issue informed defense counsel that she still was not satisfied that Camden Thoroughbred Farms was a business entity, nor that Exhibits 4, 5 and 6 were business records (TR. 8/13/82, p. 117).

The introduction of these business records was especially critical since they totally exculpate Petitioner from criminal liability as evidenced by the testimony of defense expert Carlson who stated that in each year

(1976, 1977 and 1978) which is the subject matter of the Indictment, there would be an excess of deductible disbursements over income (TR. 8/17/82, pp. 82-83). These records, thus, were probative of a fact that is of *major consequence* to the determination of this action and unequivocally relevant under even the most stringent application of Rule 401. Their exclusion as being irrelevant was, accordingly, a gross abuse of discretion which has severely prejudiced Petitioner. Moreover, the Exhibits clearly are business records within the definition of Rule 803(6) as will be demonstrated below.

The admissibility of business records is governed by Rule 803(6) of the Federal Rules of Evidence which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation,

and calling of every kind, whether or not conducted for profit.

Here, Petitioner established that he regularly and routinely kept a record of disbursements by Camden Thoroughbred Farms. Exhibits 4, 5, and 6 contain bills, invoices and other statements for services and goods rendered, such as veterinary bills, rent bills, insurance bills, etc., relating to the operation of Camden Thoroughbred Farms (TR. 8/13/82, pp. 93-94). These bills, invoices and other statements were, as testified by Petitioner, received by him from vendors whereupon Petitioner would then write a check from the Warrendale Manufacturing Michigan National Bank account payable to the vendor, or to cash, write the appropriate check number on the particular bill or invoice involved and then mail or make direct cash payment to the particular vendor (TR. 8/13/82, pp. 98-100). These Exhibits were accordingly made "pursuant to a systematic and routine procedure for the conduct of business, one characterized by careful checking and habits of precision and regularity such as will justify confidence in the reliability of the recordkeeping. *Zenith Radio Corporation* v. *Matsushita Electric Industrial Company, Ltd.*, 505 F. Supp. 1190, 1233 (E.D. Pa. 1980).

The Eighth Circuit in *In re King Enterprises, Inc.*, 678 F.2d 73 (8th Cir. 1982), decided the case of a manufacturing company being sued by a bankrupt construction company for breach of contract in connection with the construction of an airplane hangar. During the course of the trial, a question arose as to whether the construction company should be permitted to introduce into evidence various invoices which were prepared by others. In affirming the lower court's ruling to admit such invoices, the Eighth Circuit noted the following:

> In order to prove the cost of the work outside the scope of the contract ordered by Falcon, King introduced the invoices it received from businesses which supplied materials and services for this extra work. The invoices were admitted under Federal Rules of Evidence 803(6), which excepts, under certain circumstances, records of regularly conducted business activities from the hearsay rule. Falcon contends that the invoices do not fall within the exception and are in fact hearsay. We find that the invoices are within permissible limits for proving the cost of the various changes ordered by Falcon. 678 F.2d 73, 77.

In *Mississippi River Grain Elevator, Inc.* v. *Bartlett & Company, Grain*, 659 F.2d 1314 (5th Cir. 1981), one of the parties suggested that the lower court erred in admitting into evidence certain weight certificates, offered to show systematic short-weighing, which were not prepared by the party offering same. The Fifth Circuit responded in the following manner:

> MGRE assigns an overly restricted construction to Rule 803(6), one we rejected in *United States* v. *Veytia-Bravo* [citation omitted]: Rule 803(6) does *not* require that the records be prepared by the business which has custody of them. Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present testimony of the party who kept the records or supervised its preparation. 659 F.2d 1314, 1319.

A similar view of Rule 803(6) of the Federal Rules of Evidence was expressed by the Second Circuit in *United States* v. *Consolidated Edison Company of New York, Inc.*, 580 F.2d 1122 (2nd Cir. 1978). See also *Stevenson* v. *Hertz*

Corporation, 252 N.E.2d 212 (1969) where the Supreme Judical Court of the State of Massachusetts indicated a like view under Massachusetts law concerning a provision similar to Rule 803(6) of the Federal Rules of Evidence.

The Tenth Circuit in *United States* v. *Carranco*, 551 F.2d 1197 (10th Cir. 1977), decided a closely analogous case where the defendant therein was charged with knowingly receiving and possessing goods taken from an interstate shipment in violation of 18 U.S.C. §§ 659 and 2. The Court held that a freight bill was admissible as a business record, although it was initiated by a third party and later adopted and relied upon by a freight company that used the bill for inventory purposes as a means of determining whether or not a shipment had an agreed upon amount of items. The freight bill contained handwritten notations which a witness explained were made if discrepancies appeared on a statement, otherwise the freight bill remained unchanged.

Further support for the introduction of Exhibits 4, 5 and 6 as business records is found in *United States* v. *Flom*, 558 F.2d 1179 (5th Cir. 1977), where the Court admitted as business records invoices received and held by Flom's company, Florida Steel Corporation, in its regular course of business, but which were prepared and sent by another company. No testimony of the preparing business was offered, the Court finding that the testimony of an official from Florida Steel Corporation was sufficient to satisfy all the requirements of Rule 803(6) of the Federal Rules of Evidence. See also *United States* v. *Phillips*, 515 F.Supp. 758 (E.D. KY. 1981); *Rosenberg* v. *Collins*, 624 F.2d 659 (5th Cir. 1980); *United States* v. *Wigerman*, 549 F2d 1192 (8th Cir. 1977); and *United States* v. *Goins*, 593 F.2d 88 (C.A. 8 1979), cert. denied, 444 U.S. 827, 100 S. Ct. 52, 62 L. Ed. 2d 35 (1979), where the Court

held that under Rule 803(6) *any* regularly recorded memorandum made in the routine course of business is admissible to show the occurrence of a particular act or event.

A further case which is directly contrary to the holding of the Sixth Circuit in the case at bar is *United States* v. *Collyer*, 571 F.2d 941 (5th Cir. 1978), rehearing denied, 576 F.2d 1229 (5th Cir. 1979), cert. denied, 439 U.S. 933, 99 S. Ct. 325, 58 L. Ed. 2d 328 (1979), where the Fifth Circuit found no abuse of discretion where a trial court admitted, pursuant to Rule 803(6), a document that was kept in the files of one business but composed by another business. The Court stated that where a witness testified that a record was made and kept in the regular course of business and that such witness was the custodian of the record and knowledgeable as to how it arrived in his custody, *nothing more* with respect to Rule 803(6) was required for admission. Indeed, the First Circuit in *Johnson* v. *United States*, 325 F.2d 709 (1st Cir. 1963) held that a jury question is presented once a movant establishes that records were regular and kept for the management and operation of the business. The accuracy of the records has no bearing upon their admission.

See also *Fernandez* v. *Chios Shipping Company*, 542 F.2d 145 (2nd Cir. 1976), where a document was ordered, received and recorded in the regular and *routine* course of business as part of the customary business practice, and *United States* v. *Reese*, 568 F.2d 1246 (6th Cir. 1977), where a scrapbook consisting of xeroxed copies of newspaper articles purporting to show the visiting hours of patients at Elkhart General Hospital was admitted under Rule 803(6) as a business record. In doing so, the Sixth Circuit stated:

> . . . Fed. R. Evid. 803(6) allows such records of regularly conducted activity to be admitted through the testimony of "the custodian *or other qualified witness*." (Emphasis added)
>
> Crandall's testimony established that she was an employee of the hospital with knowledge of the hospital's regular practice of dating and keeping such newspaper articles in the regular course of its business. The rule is absent any requirement that the record's "custodian or other qualified witness" have personal knowledge of the particular evidence contained in the record. The fact that the item in the newspaper was factually written by a newspaper employee and not an employee of the hospital is not determinative of the exhibit's admissibility since the rule specifically provides that the "memorandum, report, record, or data compilation, in any form" could be made "from information transmitted by, a person with knowledge." In this instance, the hospital itself would qualify as a "person with knowledge." Accordingly, the trial court did not err in admitting the exhibit. Id at 1252.

Based on the foregoing, the bills, invoices and other statements for services and goods rendered as contained in Petitioner's proposed Exhibits 4, 5 and 6 are clearly "records" within the meaning and intent of Rule 803(6) of the Federal Rules of Evidence. In addition, based upon uncontroverted testimony, Petitioner had actual knowledge of each bill, invoice or other statement and made notations of the check numbers thereon at or near the time when he wrote the underlying check in payment therefor. Thus, the bills, invoices and other statements for services and goods rendered were records

of acts, events, conditions or opinions made at or near the time of the act, event, condition or opinion by a person with knowledge thereof, sufficient to demonstrate requisite trustworthiness, all as required by Rule 803(6). Thus, the failure of the trial court to admit these Exhibits under the circumstances was clearly not in accordance with the widely accepted construction of Rule 803(6). The Sixth Circuit Court of Appeals has, sub silentio, sanctioned this unjust result; i.e., the Petitioner was precluded from presenting a forceful defense to the Government's prosection.

To allow the result reached by the Sixth Circuit Court of Appeals in the instant case to stand would sanction a conflict amongst the Circuits as documented in *Collyer, Flom, Goins, Carranco, In re King, Mississippi River, Consolidated Edison* and *Johnson* with respect to the standards to be employed under Rule 803(6). Such a result would unjustly and unconstitutionally deprive criminal defendants in the Sixth Circuit of the full panoply of rights and defenses afforded other criminal defendants in other circuits.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

RUBENSTEIN, ISAACS, LAX and BORDMAN
Professional Corporation

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Dated: December 8, 1983

APPENDIX TO PETITION FOR WRIT OF CERTIORARI OF PETITIONER FRANK M. PIANKO

ORDER

(United States Court of Appeals
for the Sixth Circuit)

(Filed September 9, 1983)

(United States of America, Plaintiff-Appellee, vs. Frank M. Pianko, Defendant-Appellant — No. 82-1794)

Before: Engel, Martin and Contie, Circuit Judges.

Frank Pianko appeals from a jury verdict convicting him of five counts of knowingly evading income taxes by filing inaccurate tax returns between 1976 and 1978. 26 U.S.C. § 7201. The first three counts concerned the 1976, 1977 and 1978 returns of Pianko and his wife. The other counts concerned the 1977 and 1978 returns of Warrendale Manufacturing Company, a corporation of which the defendant was president and sole shareholder. The trial judge gave Pianko concurrent sentences of eighteen months in prison on each count. The defendant also was fined $5,000. We affirm.

Warrendale Manufacturing Company was a machine and welding shop which used two types of invoices to bill customers. One type, whose numbers were prefixed by the letter "A", generated proceeds which were deposited in Michigan National Bank but which were not reported as income on the tax returns in question. Pianko's defense was that the money in the Michigan National account was personal income, rather than corporate income, and that this income was offset by the

business expenses of Camden Thoroughbred Farms and other real property owned by the defendant. Pianko thus asserted that no tax was due and owing.

In presenting this defense, Pianko attempted to introduce what he alleged to be business records of Camden Farms. These records, consisting of various bills and invoices, purportedly showed that Pianko paid expenses incurred while operating a farming and race horse business at Camden Farms. The government objected to the introduction of these documents on the ground of relevance and because the documents were inadmissible under Federal Rule of Evidence 803(6). The court sustained the objection on both grounds.

We hold that the defendant failed to establish the relevance of the tendered documents. Evidentiary rulings in criminal cases will not be disturbed unless a district court abuses its discretion. *United States* v. *Jenkins*, 525 F.2d 819, 824 (6th Cir. 1975). This standard applies to rulings on the relevancy of evidence. *United States* v. *Phillips*, 575 F.2d 97, 100 (6th Cir. 1978). The defendant claims that the district court abused its discretion by not permitting the invoices to be read into evidence. It is undisputed, however, that the content of these documents, without more, does not demonstrate that the expenses were business related. Although Pianko was given an ample opportunity to establish through testimony that each invoice represented a business expense of Camden Farms, he never did so. Accordingly, a proper foundation for the documents was never laid. Having held the invoices inadmissible on the ground of relevance, we do not reach the Rule 803(6) question.

Pianko's second assignment of error is that the jury heard the discussion concerning the admissibility of the Camden Farms invoices. The court's failure to excuse the

jury allegedly was prejudicial because the court's decision on the admissibility question implied to the jury that the defendant's exhibits, and therefore the defendant himself, lacked trustworthiness. This argument is without merit because Pianko never requested that the jury be excused. *See* Federal Rule of Evidence 104(c).

The defendant's final contention is that the government failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The present case involves a general request for all *Brady* materials. The standard of review is whether the suppressed evidence, if exculpatory, creates a reasonable doubt that does not otherwise exist. *United States* v. *Agurs*, 427 U.S. 97, 112 (1976).

Betty Palmer, Pianko's secretary, testified that the defendant never told her to prepare the Michigan National account records so that the income deposited there could be reported. Pianko claims that although the government interviewed another secretary, Eleanor McCulskey, before trial and although the government knew that she would testify that the defendant had instructed Palmer to prepare the records, the prosecutor did not divulge this information. After the defendant mentioned McCulskey during his testimony at trial, counsel questioned her. McCulskey later testified for the defense.

We hold that the prosecutor's conduct does not implicate *Brady* because McCulskey's testimony was not exculpatory. A thorough review of McCulskey's testimony reveals that she never testified that the defendant instructed Palmer to prepare the Michigan National account records so that income could be reported. Furthermore, even if we were to hold that

McCulskey's testimony were exculpatory, no constitutional violation occurred because the latter testified fully at trial. There simply was no evidence withheld from the jury which could have created a reasonable doubt. *See Agurs, supra*. Pianko responds that had he known of McCulskey before the government completed its case in chief, he could have used her statements to impeach Palmer on cross-examination. This assertion is erroneous; during the cross-examination of Palmer, McCulskey's statements would have been inadmissible hearsay.

The judgment of the district court is Affirmed.

Entered By Order Of The Court

/s/ John P. Hehman,
Clerk

Issued As Mandate: October 3, 1983
Costs: None

(Certification Omitted)